

BEFORE THE STATE OF MONTANA
 SUPERINTENDENT OF PUBLIC INSTRUCTION

SCHOOL DISTRICT NO. 84,
 FERGUS COUNTY, MONTANA,
 Appellant

-vs-

THOMAS BRINEY,
 Respondent.

OSPI 30-82

DECISION AND ORDER

This is an appeal from School District No. 84, Fergus County, Montana, Appellant herein, appealing the decision of Fergus County Superintendent of Schools dated August 19, 1982. The County Superintendent reversed an earlier decision of the Board of Trustees of School District #84 and ordered that Thomas Briney, Respondent, be rehired by the school district or, in the alternative, receive "appropriate remuneration for the loss of his contract." Both parties are represented by counsel in this matter. Appellants have submitted written briefs. Respondent has not submitted written briefs on this matter. Oral argument was conducted by this Hearing Officer.

The State Superintendent of Public Instruction, pursuant to the Uniform Rules of Controversy, has disqualified himself from this case and has appointed this Hearing Officer to serve in his capacity. Both parties have stipulated on the acceptance of this Hearing Officer.

From the record, the following facts are found. Respondent has been employed by the Appellant School District #84, Fergus County, Montana for 14 years, as a half-time guidance counselor. He is a tenured teacher with that school district. Respondent is endorsed as a guidance counselor and is also endorsed to teach commercial and business subjects.

For several years Denton School District #84 and Geraldine School District have agreed to employ Respondent by dividing his time between schools. The Appellant School

District has experienced a declining enrollment, from 193 for the 1975-76 school year to 128 for the 1981-82 school year for grades 1 through 12. Throughout the entire hearing, the record reveals that Appellant school district was in financial trouble. The reliance on the local mill levy was approaching well over one-third of the total general fund budget of the district. From 1975 through 1982 the total certified personnel of Appellant School District has declined from 17½ positions to 14½ positions. The Appellant School District, shown through extensive testimony, made a concerted effort to reduce its costs in response to declining enrollment and still keep its programs within levels acceptable to taxpayers of the community.

The Board of Trustees was expressly concerned about the continued acceptance of high mill levies by the voters.

A collective bargaining agreement between the Appellant School District and the Denton Teacher Association provided in part:

In a situation where the board feels it necessary to relieve teachers from duties because of lack of duties or funds, or a change of curriculum or under conditions where continuation for such work would be inefficient or nonproductive, the Board may use but is not limited to the following criteria: personnel evaluations, recommendations of the administration, years of service, and the needs and requirements of the district, as determined by the board. If all of the preceding criteria were generally equal, tenured teachers would have preference over nontenured teachers.

On January 6, 1982, Appellant applied to the Board of Public Education for permission to substitute an alternative "teacher guide" plan for guidance counselor standards 406 and 407 of the Standards for Accreditation of Montana Schools in accordance with standard 108, a provision for allowing use of alternative standards. This would have had the effect of eliminating the guidance counselor position and spreading the duties among the teaching and administrative staff.

On February 1, 1982 the Board of Public Education approved the application.

On February 9, 1982, Superintendent Sorenson of Appellant School District informed Respondent of the anticipated abolishment of the guidance counselor position and the reduction in force. On February 17, 1982 the Board of Trustees received the recommendation for abolishment of the guidance counselor position from Superintendent Sorenson but did not act upon it. Also, at that time, the Board of Trustees approved tenure for nontenured teacher James Graham.

On March 8, 1982, the Board of Trustees voted not to renew Respondent's contract and to eliminate the guidance counselor position.

On March 10, 1982 Respondent was notified of the elimination of his position and the termination of his tenured services. On March 22, 1982 Appellant by letter to the Office of Public Instruction withdrew its application for use of the alternative guidance plan.

The County Superintendent also found that teacher James Graham taught business, commercial, and physical education courses, for which he is certified and properly endorsed. The County Superintendent also found that there was no substantial evidence presented to indicate that either Respondent or Graham are not qualified in the areas in which they are certified and therefore it is found that both are qualified in said areas.

The County Superintendent concluded that the Appellant School District failed to prove that the position occupied by nontenured teacher Graham was not available for Respondent although it showed some possibilities of inconvenience to the district. For purposes of this appeal the County Superintendent held that Graham was a nontenured teacher. For purpose of this review, this Hearing Officer finds that the status of "nontenure" or "tenure" has no effect on the final outcome in this case.

The budget of the Denton School District for school year 1982-83 for both the high school and the elementary school apportions a minimum amount of funds for each budget item, leaving no funds for a reserve and no reasonable reapportionment possible. The item budgeted for teacher salaries does not include a salary for a guidance counselor.

The Board of Trustees notified Respondent in writing on March 10, 1982 that his contract would not be renewed for the school year 1982-83. He requested reasons for the nonrenewal on March 14, 1982. Reasons were delivered to him in writing on March 17, 1982. On March 25, 1982, he requested a reconsideration hearing before the Board of Trustees.

On April 15, 1982, Respondent signed a contract with the Geraldine School District to continue his half-time guidance counselor position at Geraldine, knowing at that time that he would not be issued a contract by Appellant School District.

The Appellant Board of Trustees held a hearing on April 27, 1982, pursuant to stipulation of the parties. The Board made, seconded and passed a motion to affirm its earlier action not to renew Respondent's contract for 1982-83. On May 7, 1982, Respondent appealed the Board's decision to the County Superintendent of Schools.

This Hearing Officer pursuant to the Uniform Rules of School Controversy Section 10.6.125 ARM has used the Standard of Review as set out in that section. In part, that section states:

(4) The state superintendent may not substitute his judgment for that of the county superintendent as to the weight of the evidence on questions of fact. The state superintendent may affirm the decision of the county superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;
- (g) because findings of fact upon issues essential to the decision were not made although requested.

Among other errors of law, Appellant claims that there is no teaching position held by a nontenured teacher at the Appellant School District which Respondent is endorsed to fill and that no nontenured teacher will be assigned to serve as guidance counselor at Appellant School District. Appellant School District voted on February 17, 1982 to renew the teaching contract of James Graham to teach commercial, business and physical education classes. Although Respondent is certified to teach commercial and business classes, he is not certified to teach physical education. (Respondent was not endorsed to perform the duties of the position occupied by a nontenured teacher in the system.)

Appellant presents several issues before this Hearing Officer.

1. Whether the elimination of Respondent's position conformed to the requirements of Montana law.

2. Whether Appellant complied with all legal requirements of the reduction in force.

3. Whether the law requires Appellant to hire Respondent to fill a teaching position which includes subjects that Respondent is not endorsed to teach.

Appellant School District was required to reduce its staff. The Board of Trustees chose to eliminate a position. The position was that of guidance counselor. The School District applied the following criteria: recommendations of the administration and the needs and re-

quirements of the school district pursuant to the requirements of the collective bargaining agreement.

Contrary to the County Superintendent's conclusions, and from a reading of the record there is no teaching position held by a nontenured teacher at Appellant School District for which Respondent is endorsed to serve and no nontenured teacher will be assigned to serve as guidance counselor at the Denton School District. Respondent argued that a nontenured teacher, James Graham, was left on staff and should have been removed in the reduction in force. The testimony of the Superintendent of Appellant School District indicated that there was no way to reschedule the teaching assignment of the teaching staff to allow Respondent to teach business and commercial courses and still accomplish a reduction in force, since the district then would have been required to hire another teacher to teach physical education. Further, the district would have found more complications in scheduling to allow Respondent to teach part-time every day in Appellant School District and part-time at Geraldine School. From the testimony in the record, the School District at Geraldine was not willing to make the necessary rescheduling for travel and different class scheduling to allow dual employment.

State superintendent Ed Argenbright has stated on several occasions that school districts must maintain the right to transfer, assign and eliminate positions pursuant to their management rights in Section 39-31-303 MCA. See James C. Holter v. Valley County School District No. 13, OSPI 7-81, James C. Holter v. Valley School District #13, OSPI 29-82, Tim J. Massey v. Custer County District High School & Miles City School District #1, OSPI 33-82, and In the Matter of Irene Sorlie, OSPI 10-81.

From a complete overview of the record Appellant School District complied with each step required by law:

1. Appellant decided that a reduction in staff was necessary. The financial condition of the school district through the hearing testimony provided substantial evidence that the school district was in financial trouble.

2. The school district determined that a reduction in staff was necessary; and that an entire position would need to be eliminated. The position the Board of Trustees decided to eliminate was that of guidance counselor.

3. Pursuant to former decisions of the State Superintendent, the school district looked to the program to decide which individual would be eliminated. There was no group of guidance counselors to pick from because the school district had only one counselor on staff.

4. The Board of Trustees decided to eliminate the position of counseling staff, which is within their discretion, and to accept the deviation from accreditation standards. The Appellant Board of Trustees determined that the administration and the experienced tenured personnel on staff would handle all counseling problems. Counseling would no longer be a separate program. Further, the Board was relying on the plan approved by the Board of Public Education. No teacher was reassigned to assume Respondent's guidance counseling duties.

Appellant District made no assurances at any time that the board would offer Respondent a teaching contract for the 1982-83 school year.

Tenure is a substantial, valuable and beneficial right which cannot be taken away except for good cause. See the Matter of the Appeal of James C. Holter v. Valley School District. #13, OSPI 29-82, and State ex rel Saxtrorph v. District Court, Fergus County, 128 Mont. 253, 275 P.2d 209 (1954). After a conclusion is made that a teacher's position must be reduced, a school district cannot terminate a tenured teacher and retain a nontenured teacher to fill a position for which the tenured teacher is qualified. See Massey.

It must be affirmatively shown that the teacher to be rified was selected from a pool or group and that those who are to take over the RIF tenured teacher's duties are not nontenure and that in all other respects the RIF policy has been followed. The "possibility" that such may occur is not sufficient. See Holter I.

Respondent argues that since he is endorsed to teach commercial and business subjects, the school district violated its RIF policy by not renewing his contract while renewing the contract of the nontenured teacher to teach commercial and business subjects and physical education. The law does not require a school district to create a position for any person.

It is essential to the concept of tenure that this same or comparable position of employment as that provided by the last executed contract be analyzed in the record and in the findings, conclusions and order which deal with the reduction in force of a tenured teacher. This specifically refers to the grade or school in which the teacher last taught and does not mean any teaching position in which the teacher may be certified. See James C. Holter v. Valley Coun-ty School District No. 13, OSPI 7-81 and James-C. Holter v. Valley School District #13 OSPI 29-82.

The County Superintendent concluded that since there is another position available and held by a nontenured teacher, that Respondent should be given this position. This conclusion is incorrect.

Appellant Board had to decide whether to deviate from the accreditation standards by not providing a guidance counselor position or to deviate from the accreditation standards by allowing a certified teacher to teach in certain areas where he was not endorsed to teach, e.g., physical education. The school district determined that it would have less impact on the school curriculum not to provide a guidance counselor but to provide a certified teacher endorsed in the area of physical education. Further, the Board provided a plan to reassign counseling duties to teachers and administrators. Once that decision was made, Appellant had no choice but to renew the nontenured teacher's contract for 1982-83, contrary to the County Superintendent's conclusion. Appellant School District proved conclusively that not only was there no guidance counselor position available, but further established that there was no other teaching position avail-

able for which Respondent was fully endorsed to teach. Appellant fulfilled its responsibility.

The record makes it clear that the nontenured teacher was also involved in extracurricular activities throughout the school district. Such activities included coaching a variety of sports, which is important for that school district.

A nontenured teacher may be hired or retained, even though a tenured teacher is dismissed, as a result, if the tenured teacher is not qualified to teach the courses to be taught by the nontenured teacher. See 100 ALR 2d 1186. See also Holter 11, **OSPI** 29-82.

Further, the collective bargaining agreement between the Denton Education Association and the Appellant School District does not force the retention of tenured teachers who cannot teach the necessary subjects. It requires preference of tenured teachers over nontenured teachers only if all of the criteria stated in Article X, Section 4 of the collective bargaining agreement are "generally equal." These criteria are: personnel evaluations, recommendations of the administration, years of service, and the needs and requirements of the district, as determined by the board. The Board did not breach the collective bargaining agreement by retaining the nontenured teacher.

Respondent was a tenured teacher, and if certified in the areas of physical education, with experience in that school district in physical education, then the County Superintendent's decision would have been affirmed

The County Superintendents' decision is reversed.
DATED this 6th day of May, 1983.